

The Tennessee Public Records Act
and
The Office of Open Records Counsel

August 14, 2008

by

Ann V. Butterworth

Assistant to the Comptroller for Public Finance, and

Director of the Office of Open Records Counsel

Suite 1700 James K Polk Building

Nashville Tennessee 37243

Phone (615) 401-7910

Fax (615) 532-9237

Ann.Butterworth@state.tn.us

Ann Butterworth was appointed the Assistant to the Comptroller of the Treasury (for the State of Tennessee) for Public Finance in January, 1999. In 2007, she was given the additional title of Director of the Office of Open Records. She serves as the Comptroller's staff representative to the various state debt issuers, as well as representing the Comptroller on various State entities, including the Tennessee Housing Development Agency, the Water and Wastewater Management Board, and the Utility Management Review Board. She also serves as the liaison with the Tennessee State Veterans' Homes Board and represents the Office before the Finance Ways and Means Committees of the State General Assembly. Butterworth was appointed by Nashville Mayor Bill Purcell in 2007 to the Metro Nashville Employee Benefits Board for which she serves as Chairman. Previously, she served on the Board of Commissioners of the Metropolitan Nashville Airport Authority (from 2000-2007) where she served as the Vice-Chairman. Butterworth has been a Board Member of the Women in Public Finance, a non-profit corporation based in Chicago, Illinois; and currently is a Board Member of the National Council of State Housing Boards based in Washington, DC. She serves on the executive committee for the Nashville Chapter of the American Constitutional Law Society. She is a member of the National Association of Bond Lawyers. Butterworth received her JD from Vanderbilt University (1981) and her BA from Duke University (1978). Butterworth was admitted to the Florida Bar in 1981 and the Tennessee Bar in 1982. She practiced law in Florida and Tennessee before entering state service and continues to be licensed in those states. She is captain of the State of Tennessee corporate footrace team (Team Tennessee) and is a member of the Nashville Striders.

An Overview of Transparency in Tennessee Government

- Tennessee Constitution (1796 and 1870)
 - Article I, Section 19.*: “That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. . . .”
 - Article II, Sec. 22.*: “The doors of each House [of the General Assembly] and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.”
 - Article II, Sec. 21.*: “Each House shall keep a journal of its proceedings, and publish it, except such parts as the welfare of the State may require to be kept secret; the ayes and noes shall be taken in each House upon the final passage of every bill of a general character, and bills making appropriations of public moneys; and the ayes and noes of the members on any question, shall, at the request of any five of them, be entered on the journal.”
- Tennessee Open Meetings Act, T.C.A. §§ 8-44-101 et seq. (1974)
 - T.C.A. §8-44-101(a): “The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.”
 - T.C.A. §8-44-102(b)(1) “Governing body”- not single official.
 - T.C.A. §8-44-108 (1990, 1999, 2005): electronic participation; limited to state level and Belle Meade (“three member city commission population 2,500 or more as per 2000 census”)
 - (a)(3) “Necessity” means that the matters to be considered by the governing body at that meeting require timely action by the body, that physical presence by a quorum of the members is not practical within the period of time requiring action, and that participation by a quorum of the members by electronic or other means of communication is necessary;
 - Section 5 of Public Chapter 1179, Acts of 2008 (effective July 1, 2008) adds a new section (T.C.A. §8-44-109) directing MTAS/CTAS, TSBA, UMRB, State Emergency Communications Board, and the Office of Open Records Counsel to develop educational programs on open meetings laws that provide guidance for compliance.
 - Public Chapter 923, Acts of 2008, signed by the Governor on May 15, 2008 and effective July 1, 2008, allows Knox County government to utilize internet relay chat on a pilot project basis.

- Tennessee Public Records Act, T.C.A. §§ 10-7-501 et seq. (1957)(TPRA)

Section 1 of Public Chapter 1179, Acts of 2008, amends T.C.A. §10-7-503(a) in its entirety and provides:

- (a)(2)(A) “All state, county and municipal records shall at all times, **during business hours**, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any **citizen** of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by **state law**.”
- (a)(1): “As used in this part and Title 8, Chapter 4, Part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material, **regardless of physical form** or characteristics **made or received** pursuant to law or ordinance or in connection with the **transaction of official business** by any governmental agency.” *

*Substantially same definition as found in T.C.A. § 10-7-301(6)

[emphasis added]

Transparency of records under other provisions: examples where access is addressed other than under TPRA:

- T.C.A. §10-7-604 (1992): Copies of Open Appointment Annual Report “available for viewing by interested persons” and “at cost”.
- T.C.A. §47-9-525(c): No direct access but rather certification available as to UCC filings to anyone upon payment of specified fees.
- T.C.A. §8-3-104(10): “Give to **any person** requiring the same, and **paying lawful fees**, an attested copy of any act, record, or paper in the secretary of state's office, except papers relating immediately to the executive department, and, in the governor's judgment, requiring secrecy;” [emphasis added]
- HIPAA- Health Insurance Portability and Accountability Act of 1996 [Pub. L. 104-191]
 - Federal Department of Health and Human Service’s *Standards for Privacy of Individually Identifiable Health Information* (“Privacy Rule”) establishes a set of national standards for the protection of certain health information, addressing use and disclosure of individuals’ health information [45 CFR Part 160 and Part 164, Subparts A and E]
 - <http://www.hhs.gov/ocr/privacysummary.pdf>
 - <http://www.hhs.gov/ocr/hipaa>

- Federal Freedom of Information Act (FOIA) [5 U.S.C. §552]:
 - Applicable only to federal agencies, requiring disclosure of records requested in writing by any person unless exemption or exclusion applies
 - Fed Department of Justice's Office of Information and Privacy is principal contact within fed executive branch for advice and policy guidance on administration of FOIA.
 - <http://www.usdoj.gov/oip/index.html>
 - List of contacts in various fed departments <http://www.usdoj.gov/oip/foiacontacts.htm>
 - List of various fed FOIA websites http://www.usdoj.gov/oip/other_age.htm
 - 22 CFR 171: access procedures and guidelines for availability of Fed Department of State records and information
- Family Educational Rights and Privacy Act of 1974 (FERPA) (Buckley Amendment) which limits the disclosure of identifiable information from student records.

TPRA does not address disposition or retention of public records:

Disposition: "The preservation of the original records in whole or in part, preservation by photographic or other reproduction processes, or outright destruction of the records." TN Public Records Commission Rule 1210-1-2(9).

- State
 - Public Records Commission: T.C.A. § 10-7-301 et seq.
 - Records Management Division, Department of General Services (T.C.A. § 10-7-303) primary agency responsible for devising retention schedules and managing state records
- County: T.C.A. § 10-7-101 et seq. and 10-7-401 et seq.
- Municipal: T.C.A. § 10-7-701 et seq.

Retention- legally required period to retain record prior to disposal or transfer.

- Retention Schedule
 - T.C.A. §§ 10-7-404, 702
- Time frame specified in statute
 - T.C.A. § 47-9-522: Post lapse destruction of UCC filing
- Federal (tax laws):
 - Federally tax-exempt financed projects, must keep expenditure and accounting records until final maturity of debt plus three (to six) years.

TPRA covers all government agencies, not just the State, Counties and Municipalities:

Association or non-profit agency described in T.C.A. §8-44-102(b):
T.C.A. §10-7-503(d)

Search firm hired in connection with “search for director of schools or any chief public administrative officer” T.C.A. § 10-7-503(f)

Regional Airport Authorities- “Accordingly, if the Sumner County Regional Airport Authority is either a governmental agency of Sumner County, or a private entity operating as the functional equivalent of a governmental agency, then all records made or received by the Authority pursuant to law or ordinance or in connection with the transaction of official business are public records that are subject to inspection under the Public Records Act.” Op. Tenn. Att’y. Gen. 08-064 (March 24, 2008)

Statutory Exceptions To TPRA:

T.C.A. § 10-7-504 provides a list of records that are not open for public inspection; however this list is not exhaustive. Most of the exceptions to the act are codified in various other parts of the Code.

T.C.A. § 10-7-504(b): If records are designated “confidential,” a custodian must insure confidentiality in maintenance, storage, and disposal. When destroying confidential records a custodian must ensure that the records “cannot be read, interpreted or reconstructed” and the destruction must be done “in accordance with an approved records disposition authorization from the public records commission.”

T.C.A. § 10-7-504(c): Inspection available “by any person” to a confidential public record after seventy (70) years unless:

1. restricted by federal law;
2. “is a record of services for a person for mental illness or mental retardation;”
3. adoption records [*see also* T.C.A. §10-7-503(b); T.C.A. § 36-1-102(6)(B) and § 36-1-127];
4. record maintained by vital records, or
5. record maintained by TBI.

- T.C.A. § 10-7-504(a) [partial list]:
 - (1) Patient medical records from governmental hospital or medical facility
 - (2) Investigative files of TBI, Office of Inspector General, all criminal investigative files of the Department of Agriculture and the Department of Environment and Conservation, and certain files from the Department of Safety
 - (3) Security related records in possession of Military Department
 - (4) Students records in public educational institutions
 - (5) Related to pending or contemplated legal or administrative action in possession of Attorney General and Reporter

- Governmental employees:
 - T.C.A. § 10-7-504(f): *home and cell phone numbers; residential information (including street address, city, state and zip code) for state employees and residential street address for county, municipal and other employees**; bank account information; social security number; driver license information except where driving or operating a vehicle is part of the employee's job description or job duties or incidental to the performance of the employee's job; and the same information of immediate family members or household members.
*Public Chapter 853, Acts of 2008, effective May 1, 2008
 - T.C.A. § 10-7-504(d): EAP records
- Law enforcement contingency plans (responding to violence, terrorism, etc.): T.C.A. § 10-7-503(e); *see also* T.C.A. § 10-7-504(a)(14) and (21)
- Non-profit employing two or fewer full-time employees not subject to TPRA: T.C.A. § 10-7-503(d)
- Library patron records: T.C.A. §10-8-102
- Juveniles
 - Court files and records: T.C.A. §37-1-153
 - Fingerprints and photos: T.C.A. §37-1-155(b)(5)
 - Abortion petitioners: T.C.A. §37-10-304
 - In custody of Children's Services or other agency: T.C.A. §37-2-408(a)
- Taxpayers
 - Information submitted to Commissioner of Revenue: T.C.A. §67-1-110
 - Returns and audits with TDR: T.C.A. §67-4-722(c)(1)
 - Property assessment: T.C.A. §67-5-402(a)

Otherwise Provided By Law (Not found in T.C.A.):

Op.Att'y Gen. 06-069 (April 12, 2006):

- Tennessee Rules of Civil and Criminal Procedure (*see Arnold v. City of Chattanooga*, 19 S.W.3d 779 (Tenn. Ct. App. 2000); *Appman v. Worthington*, 746 S.W.2d 165 (Tenn. 1987))
- Supreme Court Rules (*Coats v. Smyrna/Rutherford County Airport Authority*, 2001 WL 1589117 (Tenn. Ct. App. Dec. 13, 2001))
- Common law (*see Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2005))
- Federal law by virtue of the Supremacy Clause of the United States Constitution. *See Seaton v. Johnson*, 898 S.W.2d 232 (Tenn. Ct. App.), *p.t.a. denied* (1995). *See also, Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1988).

Fees:

Since July 1, 2008 Section 1 of PC 1179 provides:

- T.C.A. §10-7-503(a)(7): “A records custodian may not . . . assess charge to **view** a public records unless otherwise **required** by law.” (emphasis added)
- T.C.A. §10-7-503(a)(2)(C)(i): “Until the office of open records counsel develops a schedule of reasonable charges in accordance with § 8-4-604(a)*, a records custodian may require a requestor to pay the custodian's actual costs incurred in producing the requested material; provided that no charge shall accrue for the first five (5) hours incurred by the records custodian in producing the requested material. Such actual costs shall include but not be limited to: (a) The making of extracts, copies, photographs or photostats; and (b) The hourly wage of employee(s) reasonably necessary to produce the requested information.”

(*Section 6 of PC 1179 directs the Office of Open Records Counsel to establish “[a] schedule of reasonable charges which a records custodian may use as a guideline to charge a citizen requesting copies of public records pursuant to” the TPRA. Note, October 15, 2008 is the anticipated date for completion of schedule of reasonable charges.)

T.C.A. §10-7-506(a): “[T]he lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.”

T.C.A. §10-7-123 (1997): Fees for remote computer or electronic access provided by county officials

- Reasonable amount sufficient to recover cost of providing remote access
- Statement to be filed with Comptroller of the Treasury thirty days prior to implementation
- Section specifically not permit fee for viewing records “electronic or otherwise, at the locations where they are maintained and stored”.

T.C.A. §10-7-409 (1957): County public records commission granted the authority to establish charges for “making and furnishing or enlarging copies of records” in its possession.

T.C.A. §48-11-303 (c): Business Corporate Records- “The secretary of state shall collect a fee of twenty dollars (\$20.00) for copying all filed documents relating to a domestic or foreign corporation. All such copies will be certified or validated by the secretary of state.” [only certified copies available]

T.C.A. §8-21-408 (1995, 1998): Clerks of Court fees for computer searches

Office of Open Records Counsel

The Office of Open Records Counsel was created to serve as an intermediary between local government officials and citizens who are dealing with open record issues.

- Ann Butterworth, Director
- Elisha Hodge, Open Records Specialist

Office of Open Records Counsel
Comptroller of the Treasury
State of Tennessee
Suite 1700*, James K. Polk Building
505 Deaderick Street
Nashville, Tennessee 37243-1402
(615) 401-7891, Fax (615) 532-9237
Toll free number: 1-866-831-3750
Email address: open.records@state.tn.us

(*moving to Suite 1600 late summer 2008)

The Office was set up under the purview of the Comptroller of the Treasury in the fall of 2007 with funding provided in the FY2008 budget.

Public Chapter 1179, Acts of 2008 provides statutory authority. The functions of the Office include:

1. Working to resolve issues between citizens who have made open records request and the local government entity that has either delayed granting access or denied access to the requested records. PC 1179 says the Office is *"hereby authorized to informally mediate and assist with the resolution of issues concerning the open records laws codified in Title 10, Chapter 7."*
2. Monitoring legislative bills that deal with open record issues.
3. Collecting data on issues pertaining to the Open Meetings Act inquiries and problems.
4. Answering questions and providing information through speaking engagements about the TPRA.
5. Issuing opinions as expeditiously as possible to local government officials, the public and the media regarding whether certain records are open for public inspection or are confidential, and therefore not open for public inspection; and posting the opinions on the web. PC 1179 says the Office *"shall answer questions and issue informal advisory opinions as expeditiously as possible to any person including local government officials, members of the public and the media. State officials shall continue to consult with the office of the attorney general and reporter for such opinions."*
<http://comptroller.state.tn.us/openrecords/opinion.htm>
6. Educating citizens and public officials through establishment of educational programs and materials about Tennessee's Open Records and Open Meetings laws.

7. Establishing a schedule of reasonable fees for copies and duplication of public records, developing best practice for access to open records (including various forms), and developing a policy for responding to frequent and multiple requests for access and copies.
8. Working with 13 member Advisory Committee on Open Government for guidance and advice.

Response to an Open Records Request

- Since July 1, 2008:
 - Access granted to citizen of Tennessee during business hours.
 - No charge for inspecting or reviewing an open record at offices of records custodian.
 - Custodian may take up to 7 business days to:
 - Provide access to record;
 - Deny in writing access to record with explanation of basis for denial; or
 - Indicate additional time necessary to produce the record.
 - Custodian may require requestor to produce photo id with address in order to inspect or to receive copies.
 - Request for copies may be required to be writing; request for inspection is not required to be in writing.
 - Request for copies “shall be sufficiently detailed to enable the custodian to identify the specific records”.
 - May charge and receive upfront payment for copies (and for delivery charges, if any).
- Prior to July 1, 2008:
 - Access granted to citizen of Tennessee.
 - No charge for inspecting or reviewing an open record at office of records custodian.
 - Access to be provided during business hours, with “reasonable time” to take action to protect confidential or restricted information.
 - May charge and receive upfront payment for copies (and for delivery charges, if any).

Responding to a Records Request

1. Make sure that you are the correct record custodian for the record requested.
2. Work with requestor to be as specific as possible about the record being requested.
3. Be familiar with your office’s policy and procedures for responding to a records request:
 - Photo ID requirements (acceptable alternatives to driver’s license)
 - redaction practices
 - forms
 - duplication charges and forms and timing of payment
4. Be fair and consistent in implementation; anticipate routine requests and make readily available (including posting on websites).